91-1689

Supreme Court, U.S.
FILED
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No. _____

In The

Supreme Court of the United States

October Term, 1991

WILLIAM S. PATTERSON,

Petitioner,

v.

JOHN KEANE, Superintendent, Sing Sing Correctional Facility, Ossining, New York,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR A WRIT OF CERTIORARI

WILLIAM S. PATTERSON
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84

QUESTIONS PRESENTED

1. Where the district court concluded that the federal constitutional claims raised by Petitioner were not frivolous, did the court err denying the petition on the grounds that Petition's claim is not deserving of further review?

2. Whether district court set impossibly high standard of having Petitioner prove at the outset what was contained in destroyed notes, while denying him hearing on posttrial statements and admissions which cast doubt on detective's trial testimony and reasons for destroying original notes, and said hearing would be the only way to attempt to meet it, thus depriving Petitioner right of due process under the Fourteenth Amendment to the Federal Constitution?

3. Whether the destruction and/or loss of notes and reports on the part of Suffolk County, New York, employees meets the threshold requirement of *California v. Trombetta*, 467 U.S. 479, that evidence has been destroyed or otherwise undermined by conduct of the prosecution?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner prays for a writ of certiorari to review the judgment of the the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The Opinion of the Court of Appeals, Docket Number 91-2351, unreported, is reprinted in the appendix at APP. 1. The opinion in the District Court, CV-90-1995, (denying Motion for Certificate of Probable Cause) unreported, is reprinted in the appendix at APP. 4. The

opinion of the District Court, CV 90-1995, slip op. at p. 9 E.D.N.Y. June 28, 1991, (denying Motion for Writ of Habeas Corpus), is reprinted in the appendix at APP. 9. The Opinion of the New York State Court of Appeals, reported at 71 N.Y.2d 972, is reprinted in the appendix at APP. 18. The opinion of the New York State Supreme Court, Appellate Division, (denying direct appeal) reported at 137 A.D.2d 729, 524 N.Y.S.2d 814, is reprinted in appendix at APP. 23. The opinion of the New York State Supreme Court, Appellate Division, (denying appeal of Motion to Vacate Judgment) unreported, is reprinted in the appendix at APP. 25. The opinion of the New York State Supreme Court, Suffolk County, unreported, is reprinted in the appendix at APP. 27.

JURISDICTION

The judgment of the Court of Appeals was entered on January 28, 1992. This petition for a writ of certiorari is filed within ninety days of that judgment in compliance with Rule 13. This court's jurisdiction is invoked under 18 U.S.C., Section 1254(1)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment XIV, provides in pertinent part:

> 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of

> the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

New York Constitution, Article I, Section 6, provides in pertinent part:

> No person shall be deprived of life, liberty or property without due process of law.

Title 28, United States Code, Section 2241, provides in pertinent part:

> (a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judges within their respective jurisdictions. . . .
>
> . . .
>
> (c) The writ of habeas corpus shall not extend to a prisoner unless –
>
> . . . .
>
> (3) He is in custody in violation of the Constitution or laws or treaties of the United States. . . .

Title 28, United States Code, Section 2243, provides in pertinent part:

> A court, justice or judge entertaining an application for a writ of habeas corpus shall . . . dispose of the matter as law and justice require.

New York Criminal Procedure Law, Section 450.90, provides in pertinent part:

> 1. Provided that a certificate granting leave to appeal is issued . . . , an appeal may . . . be taken to the court of appeals by either the defendant or the people from any adverse or partially adverse order of an intermediate appellate court entered upon an appeal taken to such intermediate appellate court.

STATEMENT OF CASE

1. Petitioner was indicted by a New York State grand jury for murder in the second degree. His pretrial motions to suppress statements and identification testimony was denied. (APP. 27) Petitioner was convicted following a jury trial.

2. Prior to direct appeal Petitioner filed *pro se* Motion to Vacate Judgment based on admissions made, post-trial, by Suffolk County Officials (The Police Commissioner and Homicide Chief) that detectives of Suffolk County were required to keep *"ALL"* notes during ongoing investigations, and that these comments by these officials demonstrated the testimony and act of destroying original notes by lead detective were wrong and knowingly so at time of trial. The motion was denied without a hearing, on the basis that the appeal of judgment was pending and sufficient facts were already contained in the record to permit adequate review of the issues raised. The trial court did not address Petitioner's claim that the comments of the officials could not be part of Petitioner's trial record as they took place post-trial.

Petitioner's *pro se* motion for leave to appeal the denial to the Appellate Division was denied. (APP. 25)

3. On direct appeal Petitioner asserted that the detective had destroyed his notes in bad faith because they were potentially useful to the defense and his conduct was deliberately calculated to undermine Petitioner's right to a fair trial in violation of due process under state and federal constitutions. Petitioner also asserted that another police officer's testimony about the purported loss of his memo book and notes relating to the homicide was incredible. Among the facts set forth, for the first time, in support of Petitioner's claim was a post-trial statement made by the detective in an interview with *Newsday* after his retirement in 1985. *Newsday* quoted the detective as saying "Detectives routinely destroy notes before cases go to trial – since any notes that remain in a case file can be used by a defense lawyer." The State moved in the Appellate Division to strike the above facts from Petitioner's brief as outside the record on appeal. The State's Motion was denied.

4. The Appellate Division affirmed Petitioner's judgment of conviction in a memorandum decision. *The opinion did not address* Petitioner's argument regarding the detective's destruction of his notes and post-trial statements as it stated they were **unpreserved** and without merit." (APP. 23)

5. In 1985 and 1986 the New York State Commission of Investigation held extensive hearings and investigations into the "misconduct" of the police in Suffolk County, New York. Petitioner was advised by the trial court (Judge Stuart Namm) in a letter dated June 29, 1987

(Copy appended at APP. 21) that he advised the State Commission of Investigation in a letter dated October 31, 1985: "That, in the interest of justice. . . . this case should be made a part of your investigation since there were, *in fact, instances where original police notes were destroyed and police records were allegedly stolen from the police officer's automobile.*" (Emphasis by writer)

6. In the summer of 1989 the New York State Commission of Investigation released its Findings of its investigation into the police misconduct in Suffolk County. In Finding Four (Copy appended at APP. 20) the New York State Commission of Investigation found that "The Suffolk County Police Department and District Attorney's Office engaged in and permitted improper practices to occur in homicide prosecutions, including perjury as well as grossly deficient investigative and management practices, including police testimony and other defects in homicide prosecutions, guilty persons may have well been allowed to go free." In the same report it was stated in Finding Five (Copy appended at APP. 19) that it was found "There has been pervasive lack of documentation and defective documentation, in areas which the Commission examined: homicide and narcotics cases, cases involving pen registers, and investigations by detectives in general. The effect of such lack of documentation has been to harm investigations, conceal misconduct, and prevent plaintiffs in civil actions and defendants in criminal actions from receiving documents which should have been prepared in the normal course of conducting effective police work."

7. Petitioner's application for leave to appeal to the New York Court of Appeals from the Appellate Division's affirmance of the murder conviction was denied. (APP. 18)

8. Petitioner, after the State Commission of Investigation ignored the trial judge's request and the New York State Court of Appeals denied his application, filed in the United States District Court for the Eastern District of New York a petition for a writ of habeas corpus, claiming that the detective's bad-faith destruction of evidence potentially useful to the accused constituted a denial of due process of law under the federal constitution. Petitioner argued that the State's case was entirely circumstantial and based on inferences drawn from statements purportedly made by Petitioner during the interrogation and that Petitioner's ability to challenge those statements, which he denied making, was prevented by the destruction of the detective's notes, written at the time the statements were allegedly made. Petitioner further asserted that the detective's post-trial comments to *Newsday*, from which it could be inferred that the notes were destroyed in order to avoid their use by defense counsel on cross-examination demonstrated the detective's bad-faith, particularly since the detective violated established New York Law mandating preservation of such notes, and his own departmental manual of rules and procedures which calls for "all notes" to be kept during an ongoing investigation. Finally, Petitioner maintained that he was grievously harmed by the detective's bad-faith destruction of his notes, because that misconduct impaired Petitioner's ability to challenge the prosecution theory that he was "the man that knew too much" – that he knew details about the murder of his estranged wife before the police did, as alleged by statements he allegedly made to the police. Petitioner asked that the district court either grant the petition or conduct an evidentiary hearing at which

the detective could be confronted regarding his post-trial statements to *Newsday*.

9. The district court denied the petition in a memorandum decision and order (APP. 9). The court concluded that Petitioner had "made no credible showing that the destruction of the detective's original notes was done in bad faith," dismissing the *Newsday* interview of the detective as "not relevant" because the detective "made no reference in the article to the *Patterson* litigation and spoke of 'detectives' in general terms." The court was also of the view that Petitioner had been given a full and fair opportunity to litigate his claims in the pre-trial suppression hearing and found "no valid reason for disturbing the detailed findings by the state court that the original notes were not destroyed in bad faith." Finally, the court indicated that Petitioner had been unable to raise even a colorable claim that the destroyed notes contained evidence favorable to him and material to his claim of innocence.

10. Petitioner applied to the district court for a certificate of probable cause. Petitioner submitted that the court's reliance on the state court's pre-trial findings was too heavy, since those findings did not and could not take into account the impact of the detective's post-trial statement to *Newsday* – a statement that was made *after* Petitioner's trial, and *after* the detective had retired from the police department. Petitioner urged that, at the very least, he was entitled to one full and fair hearing at which he could examine the detective regarding his statement and actions contrary to the manual of rules and procedures of Suffolk County Police Department and New York State law. Petitioner argued that whether he was entitled to

such a hearing is a question deserving further review because a defendant's burden to show a denial of due process by a police officer's destruction of evidence is an extremely difficult one – only rarely will a defendant chance upon an unguarded statement as revealing as the detective's statement to *Newsday* – and to require a greater showing than Petitioner had made, without affording him a hearing to develop his claim, saddled him with a burden impossible for any defendant to satisfy, especially where the evidence in question has been destroyed, thereby rendering illusory the due process right to be protected from the bad-faith destruction of potentially useful evidence.

11. By memorandum decision and order (APP. 4) the district court denied the application for a certificate of probable cause. The court found that the petition was not frivolous, but did not present a question deserving further review. The court, without addressing Petitioner's argument that the state trial court could not have truly known the detective's true motives for destroying his original notes as it never had the detective's *Newsday* interview at its disposal and that no hearing had ever been conducted to inquire into the detective's statements and their relevance concerning Petitioner's case. The court also repeated that Petitioner had failed to raise "even a colorable claim" that the availability of the destroyed notes could have produced a different result in the state court proceeding.

12. Petitioner filed motion for Certificate Of Probable Cause to United States Court of Appeals for the Second Circuit. Motion was denied, without opinion. (APP. 1)

REASONS FOR GRANTING THE WRIT

The Honorable Court has recently reiterated that a certificate of probable cause requires a petitioner to make a substantial showing of the denial of a federal right and that, to make such a showing, a petitioner who has been denied relief in the district court " 'must demonstrate that the issues are debatable among jurists of reason; that a court *could* resolve the issues (in a different manner); or that the questions are "adequate to deserve encouragement to proceed further." ' " *Lozada v. Deeds*, 111 S.Ct. 860, 861-62 (1991) (Emphasis and bracketed material the Court's), *quoting Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983).

Petitioner respectfully argues that he has met these standards set by the Honorable Court and is being denied the right of due process granted him under the Fourteenth Amendment to the United States Constitution. This denial has been accomplished by (1) the lower courts denying him a hearing on a detectives post-trial statement to *Newsday* that "Detectives routinely destroy notes before cases go to trial – since any notes that remain in a case file can be used by a defense lawyer." *Newsday* "Questionable Procedures Taint Murder Defendants' Confessions," December 8, 1986, p. 30. Along with the admissions by the Suffolk County Police Commissioner and Homicide Chief in August 1985, again post-trial in an interview with *Newsday*, that where homicide detectives of Suffolk County claimed they were "exempt" from taking and/or retaining notes, "Such practices violate the department's written rules and procedures. All notes are to be kept, and supplementary reports filed 'as new information is developed and investigated,' according to the

Suffolk Manual." *Newsday* "Murder-Probe Rules Changing," August 18, 1985. And, (2) the district court in this case shouldered Petitioner with an inherently impossible burden of requiring him, in effect, to prove conclusively at the outset that the destroyed notes would have been helpful to the defense, in other words, to establish the contents of notes destroyed so he could never learn their true contents, and by denying him an evidentiary hearing at which he could examine the detective, for the first time, about his post-trial statement concerning detectives' reasons for destroying notes and the post-trial admissions of Suffolk County officials that "all" notes are to be kept during an ongoing investigation. At such a hearing, Petitioner would have an opportunity to prove that the notes were indeed destroyed to frustrate the defense and impair effective cross-examination of the detective regarding the inculpatory statements he attributed to Petitioner, plus prove that the detective committed perjury when he told the trial court that there were "no rules or procedures" that prevented him from destroying his original notes. A hearing into these post-trial statements and admissions would enable Petitioner to show context of detective's post-trial interview with *Newsday*, i.e., whether or not Petitioner's litigation and/or case were discussed before or after detective's statement. In turn this would enable Petitioner to show that Det. Amato was not talking about "detectives in general", but was relating to his actions in Petitioner's case. These facts proven, the only reasonable inference to jurists of reason would be that the destroyed notes contained information helpful to the Petitioner. No greater showing could ever be made

under such circumstances, and to require a greater showing would render illusory the due process right to be protected from the bad-faith destruction of potentially useful evidence. *Arizona v. Youngblood*, 109 S.Ct. 333, 337 (1988); *California v. Trombetta*, 467 U.S. 479, 488 (1984); *Killian v. United States*, 368 U.S. 231, 242 (1961).

The prosecutions entire case against Petitioner was circumstantial and, in main, based upon Petitioner's alleged statements made on June 28, 1982 while undergoing interrogation by Det. R. Amato and others of the Suffolk County Homicide Squad. No voice recording was made of this interrogation, although equipment was available. No video recording of this interrogation was made, although equipment was available. No written waiver of *Miranda* rights was obtained from Petitioner, although forms normally used for this were available. No written statement was obtained from Petitioner, although it was claimed he was "cooperating" with the police. No witnesses were present during Petitioner's interrogation, other than police witnesses. Petitioner's need for the "original notes" made by Detective Amato is clear, as without them Petitioner could not impeach Det. Amato's testimony while he was using the sanitized re-written notes he presented to the hearing court. Anything supporting Petitioner was simply sanitized out of the detective's re-written notes and supported by fellow police officers. Thus, allowing the prosecution to present Petitioner to the jury as "the man that knew too much," and preventing Petitioner to prove to the jury that he was really "the man the police told too much to."

Evidence which impeached the credibility of a prosecution witness is "exculpatory" evidence. *See United*

States v. Bagley, 473 U.S. 667, 678 (1985). Impeachment evidence is crucial where, as here, conviction rests on inculpatory statements whose very existence is denied by the accused. That the impeachment value, and thus the exculpatory value, of Amato's notes was apparent to him before he destroyed the evidence is demonstrated here by Amato's admission to *Newsday* that such notes are routinely destroyed before cases go to trial "since any notes that remain in a case file can be used by a defense lawyer." Because the notes are not available because of their deliberate destruction by Det. Amato, the burden of proving conclusively at the outset their contents is an impossible one for the Petitioner to meet without a hearing in which Det. Amato can be questioned. *See Trombetta*, 467 U.S. at 486 ("Wherever potentially exculpatory evidence is permanently lost, courts face the treacherous task of divining the import of materials whose contents are unknown and, very often disputed.)

A hearing into the post-trial interviews and statements attributed to Det. Amato and Officials of Suffolk County in *Newsday* would possibly enable Petitioner to meet the standards of the district court and show conclusively that Det. Amato did indeed destroy his original notes in bad-faith.

Under *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, the prosecution is required to disclose, in advance of trial, evidence which is favorable to the accused. In order to safeguard the defendant's rights under *Brady*, the prosecution, as well as law enforcement officials, are under a duty to diligently preserve all materials which may be subject to disclosure (*United States v. Bryant*, 439 F.2d 642).

Det. Amato, a veteran of 18 years of police work, must have known that anything "favorable" to the Petitioner would have had to be turned over to the defense. So, for his own self-serving purposes, he destroyed his original notes and presented to the court what he purported to be an accurate copy.

Twenty-seven years ago it was stated in *U.S. v. Algranati*, 239 F.Supp. 116 (1965) that "The original notes of testimony are evidential, and upon a trial the government would be required to produce them. A defendant has a right to compare the original notes with the claimed accurate transcription." Det. Amato made sure this could not happen in the instant case by deliberately destroying his original notes.

Twenty-one years ago in *United States v. Bryant*, 439 F.2d 642, 648 (1971) it was stated that: "it is not for the prosecution, or the police, to select which materials should be destroyed and which materials should be preserved. Were law enforcement officials empowered to pick and choose the materials deemed worthy of preservation, then the due process rights guaranteed by *Brady* would be shallow indeed; *Brady* could be circumvented by merely destroying evidence unfavorable to the prosecution before it is demanded by the defendant." Detective Amato against his own departmental rules and procedures and the ruling in *Bryant* deliberately destroyed his original notes before they could be claimed by the defense, thereby deciding for himself what should be kept or destroyed, completely contrary to *Bryant*.

Sixteen years ago in *United States v. Bufalino*, 576 F.2d 446, 449 (2d Cir.), *cert. denied*, 439 U.S. 928 (1978) the court

stated "(W)e will look with exceedingly jaundiced eye upon future efforts to justify non-production of a Rule 16 or Jencks Act 'statement' by reference to 'departmental policy' or 'established practice' or anything of the like. There simply is no longer any excuse for official ignorance regarding the mandate of the law. Where, as here, destruction is deliberate, sanctions will normally follow, irrespective of the perpetrator's motivation, unless the government can bear the heavy burden of demonstrating that no prejudice resulted to the defendant." In a case decided on November 20, 1990 by the New York State Court of Appeals, *People v. Wallace*, (76 NY2d 953 (1990), it was held by the court that the "defendant was impermissibly prejudiced" when a police officer destroyed his notes of the perpetrator's description after copying it into his "buy report." The New York State Court of Appeals held that "In these circumstances, the trial court should have imposed a sanction. Where the People fail to exercise due care in preserving *Rosario* material, and defendant is prejudiced thereby, The (trial) court *must* impose an appropriate sanction." (*People v. Martinez*, 71 NY2d 937, 94 (Emphasis added)). Although the trial court had discretion to determine the specific sanction to be imposed (*see People v. Kelly*, 62 NY2d 516, 521), it was an abuse of discretion to decline to impose any sanction where, as here, defendant was prejudiced."

Petitioner maintains that he was "prejudiced" by Det. Amato's deliberate destruction of his original notes before they could be used for impeachment purposes, in violation of the courts mandate in *United States v. Bryant, supra* at p. 648. Further, Petitioner argues that he was prejudiced by Det. Amato's claim that he was "exempt"

from the rules and procedures of his department when it came to taking and retaining notes, and his action was contrary to the holding in *United States v. Bufalino, supra.*

For consideration under *California v. Trombetta, supra,* a Petitioner must meet the threshold requirement that evidence has been destroyed or otherwise undermined by the conduct of the prosecution. Petitioner argues that he meets this threshold requirement as not only did Det. Amato destroy his original notes and thus prevent Petitioner from using them for impeachment purposes, but the original, and only, notes in memo book of the first police officer to come in contact with Petitioner on June 28, 1982, (Ptl. Rubin) were lost forever when his memo book was allegedly stolen from his personal car in February 1983, eight months after he made them, while he was taking his memo book to the *"safety"* of the police station. This officer alleged that one of the questions Petitioner asked him was, "Was she sh..?", leaving it to someone's imagination to fill in the missing vowels. This alleged statement was the prosecution's opening effort to prove the Petitioner was "the man that knew too much." Petitioner could not impeach Ptl. Rubin as his notes, contained in his memo book, were allegedly stolen. The very memo book that the trial court asked the State Commission of Investigation in 1985 to include in their investigation into police misconduct in Suffolk County. (See APP. 21)

In *People v. Spivey,* ___ NYS2d ___ (1st Dept. 1992), reported in The New York Law Journal on March 24, 1992, it was held that where an officer lost his notebook, and even though the trial court held a hearing to reconstruct its contents, "The hearing was no substitute for the

actual memo book. The Trial Court was required to fashion some sanction, and its failure to do so was reversible error." (*People v. Wallace, supra; People v. Kelly*, 62 NY2d 516; *People v. Martinez*, 71 NY2d 937) Petitioner argues that he has not been afforded the sanctions as granted above, and thus has been denied the "due process of law" and "equal protection of the laws" as guaranteed in the Fourteenth Amendment to the Federal Constitution.

It is asked that it be noted that a "mandated" medical examiner's report was lost, or never prepared, by the medical examiner (an "agent" of Suffolk County) at the crime scene on June 27, 1982. This "mandated report" has a section calling for a conclusion as to the "cause of death" and defense argued that this report could have proved that the detectives knew the night of June 27, 1982 that a rifle had been used, and not that this fact was not known until the following evening as alleged by the detectives. Thus, if this form had shown this the Petitioner could have shown that he was told this information the morning of June 28, 1982 and the police lied when they claimed to have not known until the evening of June 28, 1982. Petitioner could not call the medical examiner that was at the crime scene on the night of June 27, 1982 as he was "out of the country," according to the prosecution, at the time of Petitioner's trial.

Three critical documents, i.e., (1) Det. Amato's original notes, (2) Ptl. Rubin's original and only notes, and (3) the "mandated" medical examiner's report, to support Petitioner's efforts to impeach and/or prove perjury on part of the police witnesses were either deliberately destroyed, negligently lost, or never prepared. Petitioner argues that these actions by agents of Suffolk County,

New York, meet the threshold requirement of *Trombetta, supra,* as they prove that evidence in petitioner's case has "been destroyed or otherwise undermined by conduct of the prosecution." The above also shows that the documents mentioned above were not destroyed "in good faith and *in accord with their normal practices.*" (Emphasis by writer)

The findings of the NYS Commission of Investigation shown in APP. 19 and 20 pertain to the practices of the Suffolk County Police and prosecution during the time of Petitioner's case and further support Petitioner's claim of "misconduct" in Petitioner's case.

Petitioner argues that he has shown above that his claims presented in the lower courts were indeed not frivolous and do deserve further review by the Honorable Court. The prosecution has argued that Petitioner has received a fair hearing in the courts below, but this is not so as Petitioner has not had a hearing into the post-trial comments of Det. Amato and Officials of Suffolk County, which is the only possible way that Petitioner might meet the standard set by the district court.

The district court ruled it would not disturb the trial court's findings. However, it did not address the fact that the trial court did not have the post-trial comments of Det. Amato and officials of Suffolk County that could establish the animus of the prosecution towards the Petitioner, and would surely have had an affect on the trial court's findings if they were known at Petitioner's pre-trial hearing. The trial court's findings were based only on the self-serving testimony of the very detective that destroyed his original notes, and the only person who

had reason to deny he destroyed them to "prevent their use by a defense lawyer." The trial court's letter to the State Commission of Investigation in 1985, post-trial, asking that Det. Amato's destruction of his original notes be included in its investigation, indicates that the trial court had some question on this issue, and it is entirely possible a different ruling would have been made at Petitioner's pretrial hearing if Det. Amato's true reasons for destroying his notes were made known.

The only issue in Petitioner's direct state appeal that was questioned as being part of his trial record was the post-trial statements, and the Appellate Court, Second Department, ruled this issue was "unpreserved" for their review. Without further review and a hearing being held a signal will be sent that the prosecution's witnesses can testify under oath to one thing, and turn around and say differently in public after a conviction.

Petitioner's claims have to be considered "debatable among jurists of reason" as anything that would impeach the testimony of the prosecution's witnesses, or show perjury on their part, would greatly enhance the possibility of a more favorable verdict for the Petitioner in a case that is based entirely on circumstantial evidence and that evidence is in question.

Petitioner maintains that he has shown above that the district court and court of appeals were in error when they denied him a certificate of probable cause as he has shown that his claims are not frivolous; that he has made "at least a colorable claim" that the availability of Det. Amato's original notes could have produced a different

result in the state court proceeding (*see United States v. Bagley*, 473 U.S. 667, 678).

Petitioner has also shown above that the threshold requirement to trigger a violation of due process rights under *California v. Trombetta, supra*, has been met as he has shown "that the evidence has been destroyed or otherwise undermined by conduct of the prosecution" in his case, and has been denied his rights under the Fourteenth Amendment to the Federal Constitution and Article 1, Section 6, of the NY State Constitution.

The Petitioner asks the Honorable Court that it please note he is proceeding in this matter on a *pro se* basis as he is no longer able to bear the cost of retained counsel. As a simple layman when it concerns legal aspects of various laws and rules, I have done, to the best of my ability, to remain within the the bounds of the various rules and laws. If I have stepped out of bounds in any area, I beg the Honorable Court's understanding and indulgence.

CONCLUSION

For the reasons set forth above, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals in this matter.[1]

Dated: April 21, 1992

Respectfully submitted,

William S. Patterson
Petitioner, *pro se*

---

[1] If this Honorable Court elects not to address the issues presented in this writ at the present time, it is requested that the writ issue and that the matter be remanded to the Court of Appeals for redetermination in light of this Honorable Court's opinion in *Lozada v. Deeds*, 111 S.Ct. 860.

United States Court of Appeals
FOR THE SECOND CIRCUIT

PATTERSON
- V. -
KEANE
Use short title

(Filed Jan. 28, 1992)

91-2351
Docket Number

NOTICE OF MOTION
state type of motion
for certificate of probable cause

MOTION BY: *(Name, address and tel. no. of law firm and of attorney in charge of case)*

Diarmuid White
Lipsitz, Green et al.
110 E. 59 St., NY, NY 10022
(212) 909-9670

Has consent of opposing counsel:

A. been sought	_ Yes	X No
B. been obtained	_ Yes	X No
Has service been effected?	X Yes	_ No
Is oral argument desired? *(Substantive motions only)*	_ Yes	X No
Requested return date: Nov. 19, 1991 *(See Second Circuit Rule 27(b))*		
Has argument date of appeal been set:		
A. by scheduling order?	_ Yes	X No

B. by firm date of argument notice? _ Yes X No
C. If Yes, enter date:_____

Judge or agency whose order is being appealed:
ARTHUR D. SPATT, U.S.D.J.

OPPOSING COUNSEL: *Name, address and tel. no. of law firm and of attorney in charge of case)*

Steven Hovani, ADA
Suffolk Co. DA's Office
Crim. Courts Bldg.
Riverhead, NY 11901
(516) 548-3590

EMERGENCY MOTIONS, MOTIONS FOR STAYS & INJUNCTIONS PENDING APPEAL

Has request for relief been made below? _ Yes _ No

(See F.R.A.P. Rule 8)

Would expedited appeal eliminate need for this motion?
_ Yes _ No

If No, explain why not:

Will the parties agree to maintain the status quo until the motion is heard? _ Yes _ No

---

Brief statement of the relief requested:

Issuance of certificate of probable cause to habeas corpus petitioner.

Complete Page 2 of This Form

By: *(Signature of attorney)*
/s/ Diarmuid White
Signed name must be printed beneath

DIARMUID WHITE

Appearing for: *(Name of party)*
WILLIAM PATTERSON
Date
NOVEMBER 4, 1991

Appellant or Petitioner:
X Plaintiff _Defendant
Appellee or Respondent:
_ Plaintiff _ Defendant

ORDER

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IT IS HEREBY ORDERED that the motion be and it hereby is granted denied

/s/ Illegible
Illegible

Circuit Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

WILLIAM S. PATTERSON,

Petitioner,

-against-

JOHN KEANE, Superintendent, Sing Sing Correctional Facility, Ossining, New York,

Respondent.

MEMORANDUM DECISION AND ORDER

CV90-1995 (ADS)

(Filed Oct. 15, 1991)

SPATT, District Judge.

William S. Patterson ("Patterson" or "petitioner"), seeks a certificate of probable cause pursuant to 28 U.S.C. § 2253, after this Court's denial of his petition for a writ of habeas corpus. For the reasons stated below, the application for the certificate is denied.

BACKGROUND

By memorandum decision and order dated June 28, 1991 ("June 28, 1991 Decision"), this Court denied Patterson's petition for a writ of habeas corpus, and by judgment dated July 11, 1991, the petition was dismissed. The factual history of this case is set forth in detail in the June 28, 1991 Decision, familiarity with which is assumed.

On January 10, 1985, the petitioner was convicted, after a jury trial, in the County Court of Suffolk County, of second degree murder. Petitioner's conviction was affirmed by the Appellate Division, Second Department

on February 16, 1988 (*People v. Patterson*, 137 A.D.2d 729, 524 N.Y.S.2d 814 [2d Dep't 1988]). Leave to appeal to the Court of Appeals was denied on April 12, 1988 (*People v. Patterson*, 71 N.Y.2d 972, 524 N.E.2d 437, 529 N.Y.S.2d 83 [1988]).

Thereafter, petitioner sought a writ of habeas corpus in this Court, alleging that a detective had destroyed, in bad faith, original handwritten notes of his pre-arrest interrogation, thus effectively depriving him of due process of law in violation of his Fourteenth Amendment rights.

On June 28, 1991, this Court denied the petition, relying on the state court's finding that a thirty-four page memorandum of the detective's interrogation of petitioner was the "duplicative equivalent" of his original notes (*Patterson v. Keane*, No. CV-90-1995, slip op. at p. 9 [E.D.N.Y. June 28, 1991]). Moreover, this Court found that the petitioner failed to make "even a colorable claim" that the availability of the destroyed notes could have produced a different result in the state court proceeding (*id.* at p. 7, *citing United States v. Bagley*, 473 U.S. 667, 678 [1985]; *People v. Pawlowski*, 116 A.D.2d 985, 498 N.Y.S.2d 711, 712 [4th Dep't 1985]).

As evidence in support of his allegation of the detective's alleged bad faith, Patterson submitted a quotation from a *New York Newsday* article, attributable to the detective, that "Detectives routinely destroy notes before a case goes to trial since any notes that remain in the case file can be used by a defense lawyer" (*New York Newsday*, "Questionable Procedures Taint Murder Defendants'

Confessions", Dec. 8, 1986, at p. 30). In denying Patterson's petition for habeas corpus relief, this Court held that the quote was irrelevant to the petitioner's claim, finding that the detective's statements in this article were only general conclusions and made no specific reference whatsoever to the petitioner's case. This Court concluded that no valid reason was presented to disturb the detailed findings made by the state court that the original notes were not destroyed in bad faith, that the detective's memorandum was the duplicative equivalent of the notes, and that, accordingly, no colorable constitutional claim was raised to warrant overturning the state-court conviction.

The petitioner now seeks to appeal, but must first apply to this Court for a certificate of probable cause.

DISCUSSION

"To obtain a certificate of probable cause, the petitioner must demonstrate that the petition is not frivolous *and* that it presents some question deserving of appellate review. Merely asserting a non-frivolous claim is insufficient to obtain a certificate, since the petitioner must in addition demonstrate that his non-frivolous petition presents some question deserving of appellate review" *Rodriquez v. Scully*, 905 F.2d 24, 24 [2d Cir. 1990] [per curiam]).

Initially, for the reasons stated in the earlier decision, the Court finds that the petition is not "frivolous". However, the Court also finds that it does not present a question deserving of appellate review.

Petitioner contends that this Court "undervalued" the significance of the *Newsday* quotation, and placed

"too heavy" a reliance on the state court's pre-trial findings. The quotation formed the basis of the petitioner's "bad faith" destruction claim on his direct appeal to the Appellate Division, which specifically found the petitioner's claims without merit, and affirmed the conviction (*see People v. Patterson*, 137 A.D.2d 729, 524 N.Y.S.2d 814 [2d Dep't], *lv. to appeal denied*, 71 N.Y.2d 972, 524 N.E.2d 437, 529 N.Y.S.2d 83 [1988]). Moreover, as this Court noted in the June 28, 1991 Decision, while petitioner's direct appeal was pending, the petitioner, acting *pro se*, filed two motions pursuant to New York Criminal Procedure Law § 440.10 to vacate the judgment of conviction, both of which were based upon the same claim raised here. Both motions were denied by the state court.

Petitioner has been afforded a full and fair opportunity to litigate his claims. He was afforded an extensive pre-trial suppression hearing on the issue of the destruction of the original notes. As in the initial petition which resulted in the June 28, 1991 Decision, the petitioner has failed to raise "even a colorable claim" that the availability of the destroyed notes could have produced a different result in the state court proceeding (*see United States v. Bagley, supra*, 473 U.S. at p. 678). Accordingly, in this Court's view, the application does not present any question deserving of appellate review.

CONCLUSION

Based upon the foregoing, the Court finds that although the petition is not "frivolous", it is not deserving of appellate review and, accordingly, the application for a certificate of probable cause is denied.

Dated: Uniondale, New York
October 15, 1991

SO ORDERED

/s/ Arthur D. Spatt
ARTHUR D. SPATT
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

WILLIAM S. PATTERSON,

Petitioner,

-against-

JOHN KEANE, Superintendent, Sing Sing Correctional Facility, Ossining, New York,

Respondent.

MEMORANDUM DECISION AND ORDER

CV90-1995 (ADS)

SPATT, District Judge.

Willaim S. Patterson ("petitioner"), seeks a writ of habeas corpus pursuant to 28 U.S.C. § 2254. For the reasons stated below, the petition is denied.

On January 10, 1985, petitioner was convicted after a second jury trial in the County Court, Suffolk County, for murder in the second degree. Petitioner appealed from the conviction alleging, among other grounds, that the bad faith destruction of original handwritten notes taken by a detective during an interrogation of petitioner prior to his arrest effectively deprived petitioner of due process of law and violated petitioner's Fourteenth Amendment rights. This issue forms the basis of petitioner's present request for habeas corpus relief.

I. BACKGROUND

On June 27, 1982, Francis Patterson, the estranged wife of petitioner, was mortally wounded as a result of a

gunshot wound to her head caused by a bullet fired from a .35 caliber rifle. The shooting occurred while Mrs. Patterson was in her house located at 8 Atlas Way, East Northport, New York, and in the presence of her two children.

On June 28, 1982, petitioner arrived at the crime scene from his Georgia residence and agreed to voluntarily accompany the police to the precinct to discuss the incident. At the precinct, petitioner was informed that he was a suspect in his estranged wife's murder. Petitioner was told, prior to the interrogation, however, that he was free to discontinue the questioning and leave at any time. Petitioner was given his *Miranda* warning by Detective Robert Amato in the presence of Detective Thomas Cavanagh. Petitioner stated that he fully understood those rights, waived the presence of counsel and agreed to speak to the detectives in the absence of an attorney. Petitioner was then interviewed over the next several hours by various members of the Homicide Squad concerning the case.

Detective Amato took about ten pages of handwritten notes on memo paper, scraps of paper and a matchbook cover during the course of his June 28, 1982 interview of the petitioner. He destroyed these original notes after transposing them into a thirty-four page memorandum while on a flight to Atlanta that same evening. All of the transposed notes were then turned over to the defense counsel as *Rosario* material during the course of the pretrial hearing.

It is the destruction of Detective Amato's original notes as well as his trial and post-trial statements regarding this destruction that is the basis of petitioner's instant claim.

A suppression hearing concerning the destruction of the original notes was held by the trial court on July 20, 1984. The court held that Detective Amato's formal thirty-four page report was the "duplicative equivalent" of his original notes which he destroyed. The court also found the destruction of those notes was not in bad faith as it was not done to deliberately impede or frustrate the efforts of defense counsel.

As evidence of Detective Amato's alleged bad faith destruction of the interrogation notes, petitioner subsequently submitted on direct appeal to the Appellate Division, an article that appeared in *New York Newsday* on December 8, 1986, which contained an interview with Detective Amato. In this interview, conducted after his retirement from the Suffolk County Police Department, Detective Amato is quoted as stating that, "Detectives routinely destroy notes before cases go to trial – since any notes that remain in a case file can be used by a defense lawyer." In addition, he is quoted as saying that, "the less you take, the better off you are." *New York Newsday*, "Questionable Procedures Taint Murder Defendants' Confessions," December 8, 1986, at p.30. The comments allegedly made by Detective Amato in the *New York Newsday* article, however, were stated by Detective Amato generally and were unconnected to the facts in issue in the instant claim.

Petitioner's conviction was affirmed by the Appellate Division, Second Department on February 16, 1988. Leave to appeal to the Court of Appeals was denied on April 12, 1988.

II. DISCUSSION

The court may not entertain a petition for a writ of habeas corpus until the petitioner has exhausted all available state remedies (*see* 28 U.S.C. § 2254[b][c]). To satisfy this requirement, petitioner must have put the "state courts on notice that they are to decide federal constitutional claims" (*Petrucelli v. Coombe*, 735 F.2d 684, 687 [2d Cir. 1984]). In addition, the petitioner must have presented his claim to the "highest state court from which a decision can be had" (*Daye v. Attorney General*, 696 F.2d 186, 190 n.3 [2d Cir. 1982] [en banc], *cert. denied*, 464 U.S. 1048 [1984]).

As a threshold matter, the Court finds that petitioner has exhausted all available state court remedies on this issue. As noted above, petitioner raised the instant claim to the Appellate Division, Second Department, by arguing that the bad faith destruction of Detective Amato's interrogation notes obliterated petitioner's chance for a fair trial in violation of both the Federal and State Constitutions. Finding this, as well as his other claims without merit, the Appellate Division, Second Department, affirmed his conviction (*see People v. Patterson*, 137 A.D. 2d 729, 524 N.Y.S.2d 814 [2d Dept. 1988]).[1] The Court of

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[1] While petitioner's direct appeal to the Appellate Division, Second Department, was pending, petitioner, acting

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Appeals denied petitioner review, thus exhausting petitioner's available state remedies (see *People v. Patterson*, 71 N.Y.2d 972, 524 N.E.2d 437, 529 N.Y.S. 2d 83 [1988] [Kaye, J.]).

To prevail on a claim that the prosecution improperly withheld or destroyed exculpatory material petitioner must show that the prosecution suppressed evidence which is favorable to him and material to either guilt or punishment (*see Brady v. Maryland*, 373 U.S. 83, 87 [1963]; *see also People v. Rosario*, 9 N.Y.2d 286, 173 N.E.2d 881, 213 N.Y.S.2d 448 ([1961]).

At the suppression hearing, the court found that the thirty-four page memorandum written by the detective,

> "contained statements attributed to the defendant by Detective Amato which are both inculpatory and exculpatory in nature depending upon one's subjective interpretation. The defendant has not demonstrated to the court that the second draft of Amato's notes failed to include additional exculpatory comments of the defendant which might have appeared in the original notes, or that Detective Amato fabricated or embellished events and statements made by the defendant during his interview by the police on June 28, 1982" (*see* Petition for Writ of Habeas Corpus, June 13, 1990, Appendix A, at p.15).

That the original notes were unavailable for actual comparison does not mandate a *per se* inference that the

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pro se, filed two motions pursuant to N.Y.Crim.Pro.L. §440.10 to vacate the judgment of conviction. Both motions argued the identical claim before this Court. The motions were denied in decisions dated May 21, 1986 and July 15, 1987.

defendant was denied a fair trial (*see United States v. Bagley*, 473 U.S. 667 (1985]). Detective Amato testified at the petitioner's trial, and there was no indication that he did not have an independent recollection of the circumstances surrounding petitioner's arrest.

At trial, defense counsel had ample opportunity to cross-examine Detective Amato in an attempt to discredit his version of the information contained in the original notes. The record indicates that the detective was extensively cross-examined, largely with the aid of the transcribed notes. Although defense counsel raised the issue in summation, no adverse inference charge was requested with respect to the destruction of the original notes.

Petitioner's claim cannot succeed without a showing that disclosure of the original notes to the defense could have produced a different result in the state court proceeding (*see United States v. Bagley, supra*, 473 U.S. 667; *People v. Pawlowski*, 116 A.D.2d 985, 498 N.Y.S.2d 711 [4th Dep't 1985] [destruction of original notes which makes a comparison with the duplicate impossible, does not necessarily deprive defendant of a fair trial]).

Here, petitioner has been unable to raise even a colorable claim that the detective's discarded notes contained evidence favorable to the petitioner and material to his claim of innocence and that such exculpatory evidence was excluded in the transcribed notes.

Petitioner has also made no credible showing that the destruction of the detective's original notes was done in bad faith. At the July 20, 1984 suppression hearing, the trial judge found that:

"the original handwritten notes totalling ten pages written by Detective Amato as and after the defendant answered questions of the police consisted of abbreviations, shorthand notations and scratch notes barely discernible by the detective himself. These original notes were written by him hastily without regard to legibility, comprehensive thought or chronological order. Later that day, while flying to Atlanta, to continue the investigation, Detective Amato reviewed his original notes and transposed them into a thirty-four page memorandum, while the events of the day were still clear in his mind. The detective's explanation as to why he did so is fully worthy belief and reasonable under the circumstances; i.e. the original scratch notes would have been uncomprehensible to him or anyone else in the future unless transposed into a more legible, understandable form, and complete as to original content. Accordingly the court concludes that Detective Amato acted in good faith in failing to retain his original notes and was not, as defendant urges, motivated by a pernicious scheme to thwart the ability of the defendant to effectively cross-examine him at trial using his notes for such purpose. The court has no reason to believe the second draft was anything more or less than a duplicative equivalent of the detective's original notes. *People v. Consolazio* 40 N.Y.2d 446, *People v. Malinsky* 15 N.Y.2d 86, *People v. Rosario* 9 N.Y.2d 286. *Supra* p. 15."

In support of petitioner's claim of Detective Amato's alleged bad faith in the destruction of the original interrogation notes, petitioner presented a quote attributable to Detective Amato, after his retirement, appearing in a

New York Newsday article. The article quotes the detective as saying that "Detectives routinely destroy notes before a case goes to trial since any notes that remain in the case file can be used by a defense lawyer." *New York Newsday* "Questionable Procedures Taint Murder Defendants' Confessions", December 8, 1986, at p.30.

The quote attributed to the detective is not relevant to the issue presented in the instant claim. Detective Amato made no reference in the article to the *Patterson* litigation and spoke of "detectives" in general terms. In the *Patterson* litigation, Amato discarded his initial notes but retained a complete equivalent comprising thirty-four pages which was tuned over to defense counsel. However, even assuming, *arguendo*, an unprincipled motive for Amato's action, petitioner has failed, for the reasons discussed above, to show any prejudice inuring to petitioner as a result.

In the instant case, petitioner was given full and fair opportunity to litigate his claims. Petitioner was afforded a hearing as to whether Detective Amato's formal report was the duplicative equivalent of his original scratch notes, and whether that destruction was in bad faith. At the pre-trial suppression hearing, the trial judge devoted four pages to this issue and concluded that Detective Amato presented "uncontradicted and unimpeached testimony which demonstrated that the thirty-four page second draft notes were a duplicative equivalent in thought and content of the original notes." The trial judge also found that the destruction of the originals were done "in good faith and not to thwart the defense by illegal suppression of his original notes."

I see no valid reason for disturbing the detailed findings by the state court that the original notes were not destroyed in bad faith and were fully incorporated into the transcription prepared by the detective. Petitioner's quarrel with that decision cannot provide a basis for relief.

III. CONCLUSION

Petitioner's claim that he was denied due process by Detective Amato's destruction of the original interrogation notes is without merit. Accordingly, the petition for a writ of habeas corpus is hereby denied.

DATED: Uniondale, New York
June 28, 1991

SO ORDERED

/s/ Arthur D. Spatt
ARTHUR D. SPATT
United States District Judge

State of New York,
Court of Appeals,
(Seal)
Judith L. Kaye
Judge

230 Park Avenue Suite 826
New York, New York 10169

April 12, 1988

Bennett L. Gershman, Esq.
47 Mamaroneck Avenue, Ste. 110
White Plains, NY 10601

RE: People v William S. Patterson

Dear Mr. Gershman:

Enclosed you will find a copy of an order signed today, denying your application for permission to appeal to the Court of Appeals in the above-referenced case.

Very truly yours,

/s/ Judith S. Kaye
Judith S. Kaye

JSK/swk

Enc.

cc: Hon. Patrick Henry
District Attorney – Suffolk County

Clerk's Office
Court of Appeals

Finding 5:

There has been a pervasive lack of documentation, and defective documentation, in Suffolk Police and District Attorney investigations in areas which the Commission has examined: homicide and narcotics cases, misconduct cases, cases involving pen registers, and investigations by detectives in general. The effect of such lack of documentation has been to harm investigations, conceal misconduct, and prevent plaintiffs in civil actions and defendants in criminal actions from receiving documents which should have been produced in the normal course of conducting effective police work.

Finding 6:

Prior to the Commission's investigation, and during its early stages, Suffolk narcotics investigations and prosecutions had experienced a breakdown of supervision which permitted drug use by police officers, lack of proper controls on informants, illegal wiretapping, and fraud in obtaining favorable treatment in a narcotics case for the son of the Suffolk Police Chief of Detectives.

In the final section of this Report, following its discussion of the factual bases for its

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Attorney's Office, permitted these crimes to occur and helped to conceal them.

Finding 3:

The Suffolk County Police Department and District Attorney's Office have failed to properly investigate and punish instances of employee misconduct, including criminal conduct, even when these instances were known to supervisory personnel. Both offices failed to establish minimal procedures to insure the investigation and punishment of employee misconduct, and the Police Department had a deliberate policy, at least in cases involving litigation, of not investigating and punishing misconduct at all.

Finding 4:

The Suffolk County Police Department and District Attorney's Office engaged in and permitted improper practices to occur in homicide prosecutions, including perjury, as well as grossly deficient investigative and management practices. Because of credibility problems with prosecution testimony, including police testimony, and other defects in homicide prosecutions, guilty persons may well have been allowed to go free.

* * *

(Seal)

STUART NAMM
JUDGE

Judge's Chambers
County Court of Suffolk County
207 Hallock Road
Stony Brook, New York 11790

June 29, 1987

Mr. William Patterson
#85-A-1484
Sing Sing Correctional Facility
354 Hunter Street
Ossining, New York 10562

Dear Mr. Patterson:

I am in receipt of your lengthy letter of June 24, 1987, and while I feel no obligation to respond thereto, I am doing so as a matter of common decency. Despite your protestations that you were unjustly convicted of the murder of your wife as a result of evidence which should not have been admitted by me at your trial, and your other accusations, on December 3, 1985 I forwarded a copy of your letter of October 31, 1985 addressed to Justice Arthur Cromarty on to Thomas F. Staffa, Esq., the former Chief Counsel of the New York State Commission of Investigations.

He was advised by me that: "In the interest of justice . . . this case should be made a part of your investigation since there were, in fact, instances where original police notes were destroyed and police records were allegedly stolen from the police officer's automobile."

If you have not heard from the Commission by this time, I can only presume that they have chosen not to investigate your case for whatever reason. However, this matter has been in their hands for some eighteen months

as of this date, and your future correspondence should be directed to that body.

Very truly yours,

/s/ Stuart Namm
STUART NAMM
COUNTY JUDGE

SN:hjs

cc: John Kennedy, Esq.
New York State Commission of Investigations

APPELLATE DIVISION: SUPREME COURT
SECOND JUDICIAL DEPARTMENT

THE PEOPLE OF THE STATE OF NEW YORK,

Plaintiff,

-against-

WILLIAM S. PATTERSON,

Defendant.

ORDER

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Appeal by the defendant from a judgment of the County Court, Suffolk County (Namm, J.) rendered February 26, 1985 convicting him of murder in the second degree, upon a jury verdict, and imposing sentence. The appeal brings up for review the denial, after a hearing, of that branch of the defendant's omnibus motion which was to suppress statement he made to the police.

Ordered that the judgment is affirmed.

The hearing court did not err in denying the defendant's motion to suppress the statements made by him to the police. The defendant was represented by an attorney in a bankruptcy proceeding that was unrelated to the homicide that the police were investigating. The right to counsel based on the individuals representation in a pending proceeding does not extend to unrelated proceedings of a wholly civil nature (See *People v. Lucarano*, 61 NY2d 138, 145.)

Upon our examination of the record herein, we find the evidence viewed in the light most favorable to the

prosecution (see *People v. Contes*, 60 NY2d 620) was legally sufficient to establish the defendant's guilt beyond a reasonable doubt. Upon the exercise of our factual review, we are satisfied that the verdict of guilt was not against the weight of the evidence (CPL 470.15(5)).

We have considered the defendant's remaining contentions and find them either unpreserved for appellate review or without merit.

Dated: February 19, 1988

APPELLATE DIVISION: SUPREME COURT
SECOND JUDICIAL DEPARTMENT

BEFORE: HON. WILLIAM C. THOMPSON, Associate Justice.

THE PEOPLE, etc.,

Plaintiff,

v Order

WILLIAM S. PATTERSON,

Defendant.
(Ind.No. 2498/83)

In the above entitled cause, the above named William S. Patterson, defendant, having moved in this court for leave to appeal thereto from an order of the County Court, Suffolk County, dated May 21, 1986; and this court, by order dated September 9, 1986, having referred said application to me for determination;

Now, upon the papers filed in support of said application and the papers filed in opposition or in relation thereto; said application having been duly submitted and due deliberation having been had thereon; and upon the decision slip heretofore filed and made a part hereof, it is

ORDERED that the said application for leave to appeal to this court is hereby denied.

Dated, Brooklyn, N. Y.,
September 9, 1986

/s/ William C. Thompson
Hon. William C. Thompson,
Associate Justice, Appellate Division,
Supreme Court, Second Judicial Department.

nl
September 9, 1986

No. 5208

The People, etc., plaintiff, v.
William S. Patterson, defendant.

(Ind. No. 2498/83)

Motion by defendant, pursuant to CPL 450.15, 460.15 for leave to appeal to this court from an order of the County Court, Suffolk County, dated May 21, 1986.

Motion referred to Hon. WILLIAM C. THOMPSON, an Associate Justice of this court.

MOLLEN, P.J., LAZER, MANGANO & BRACKEN, JJ., concur.

Motion for leave to appeal to this court denied by Justice THOMPSON,

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September 9, 1986
PEOPLE v PATTERSON, WILLIAM S. No.5208

MEMORANDUM

COUNTY COURT,
SUFFOLK COUNTY

Trial Term, Part VI

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THE PEOPLE OF THE
STATE OF NEW YORK

VS

WILLIAM PATTERSON

Defendant

---x

BY: NAMM, J.C.C.

Dated: July 20, 1984

Indictment #2498-83

Hon. Patrick Henry, Esq.
SUFFOLK COUNTY
DISTRICT ATTORNEY
By: Steven Wilutis, Esq.
Assistant District Attorney
Criminal Courts Building
Center Drive South
Riverhead, NY 11901

Robert Gottlieb, Esq.
ATTORNEY FOR THE
DEFENDANT
368 Veteran's Memorial
Highway
Commack, NY 11725

The defendant, William Patterson, is changed in a one count indictment with the commission of the crime of Murder in the Second Degree in that he caused the death of Frances Patterson by shooting her with a rifle.

The evidence to be offered by the prosecution at trial is largely circumstantial in nature. A hearing to determine if certain testimonial evidence which the prosecution intends to offer during trial should be suppressed was conducted by the court on May 30, 1984 through June 7, 1984 at which several police and civilian witnesses testified. This decision is written in furtherance of the

court's decision rendered June 11, 1984 placed orally on the record prior to the commencement of trial.

FINDINGS OF FACT

On June 27, 1982 the victim, Frances Patterson, the estranged wife of the defendant, William Patterson, was mortally wounded as a result of a gunshot wound to her head caused by a bullet fired from a .35 caliber rifle, while in her home at 8 Atlas Way, East Northport, New York, in the presence of their two children.

On June 28, 1982, P.O. Jeffrey Rubin, a uniformed officer of the Second Precinct, Suffolk County Police Department, was assigned to the crime scene. He was advised by his supervisor to contact him if the deceased's husband, the defendant, appeared at the scene, and that he was only to tell him that an incident occurred at his wife's home. The police had been advised earlier that morning that the defendant was scheduled to return to New York from Georgia for a bankruptcy hearing in Federal Court, involving him and the deceased. This information was provided by the defendant's brother-in-law, a Richard Marconi.

Detectives Robert Amato and Thomas Cavanagh and Detective Sergeant Robert Misegades of the Suffolk County Police Department Homicide Squad were assigned to the investigation of the murder with Detective Sergeant Misegades acting in supervision thereof, and Detective Amato acting as the lead detective.

At 8:23 a.m. a white vehicle approached the crime scene at 8 Atlas Way, and a male exited the vehicle and

walked towards the house. Three uniformed officers were present at the scene, including P.O. Rubin, who approached the male who stated substantially as follows: "I am just getting back from Georgia. What happened to my wife?" He repeated the question, "What happened to my wife?" several times, and was told only that an incident had occurred, pursuant to the instructions which had been given to Officer Rubin by his superior. The defendant then asked, "Was she sh. . . . ?" without pronouncing any vowel after "sh". No one had given him any information as to what had happened to his wife. The defendant pushed himself to the ground several times and attempted to break through the tape which surrounded the crime scene. He was then seated in the back of the police vehicle with the doors partially open. At that point Detective Cavanagh arrived on the scene, went to the police vehicle and introduced himself as a member of the Suffolk County Police Department Homicide Squad. He asked the defendant if he would accompany him to the precinct to discuss what had happened at 8 Atlas Way. The defendant agreed to do so voluntarily and he was seated in the front passenger seat of the detective's vehicle, neither under arrest nor handcuffed.

The defendant was driven by Detective Cavanagh to the Fourth Precinct where he was met by Detective Amato as they entered an interview room at the precinct at about 9:00 a.m. Detective Amato was introduced to the defendant by Detective Cavanagh and Amato was told that Cavanagh had not said anything to the defendant about the events which occurred on June 27, 1982 at 8 Atlas Way. The defendant then asked Detective Amato:

"What's going on?" and he was told by him, "Your wife was watching TV and she was shot through a window." At this point the defendant fell to the floor and he was asked to get up and was given a cigarette. He then asked, "Who killed my wife?" He was told that the police did not know, but that they had many questions to ask of him.

He was told that if he did not feel up to the questioning at that time, he could stop the questioning at any time. He was also told that he would have to be considered a suspect, and the defendant was orally given his *Miranda* warnings by Detective Amato in the presence of Detective Cavanagh. The defendant fully understood these rights, waived the presence of counsel and agreed to speak to the detectives in the absence of an attorney, announcing, "Of course, I'll be only too happy to help you guys out." He was free to leave at anytime.

The defendant then spent the next several hours being interviewed by various members of the homicide squad concerning this case. He stated that he had been married to the deceased for 15 years; that they had two children together; and that they had been separated for about six months after having grown apart from each other. He told them that the separation had been mutually agreed upon, that each of them were quite agreeable, and that he had given her the house and plenty of money. He told them that he had never been unfaithful to his wife until he had met Trisha Martin, his girlfriend at that time, only after they had separated, and that he was then living with Trisha in Jonesboro, Georgia. Trisha had worked for him at his place of employment in Georgia. He pointed out that he had been previously employed by

Inter-Con as a regional manager in New York State, that they had opened an office at the Hartsdale Airport in Atlanta, and that they had fired everyone, including the defendant, after they had closed that office. The defendant voiced his belief that he had been "screwed" by his former employer.

He was then asked about an anonymous letter which had been sent to his former employer at their Boston office and whether he had accused his wife of writing that letter. The defendant denied knowledge of any such letter.

He pointed out that he was presently employed by Air Freight Ground Service as a mechanic at the airport earning an annual salary of $18,000, whereas he had previously earned $35,000 a year and had a company expense account and car at his prior employment. He stated that he and the deceased were scheduled to attend a bankruptcy court hearing that morning because of his financial problems.

He could not think of anyone who would have murdered his wife since she had no enemies. He pointed out that Frances had previously been married to a Giovanni Russo and had been divorced in Nevada. He was positive that his wife had no boyfriend or lovers since she never went out. Her only friend was a woman named Mona whose husband handled their insurance needs. He stated that he never owned, shot or even held a rifle and that in the Air Force he used a Daisy air rifle for training purposes. He also stated that he never owned any ammunition. The defendant was then asked if he would submit to

an "FDR" test, a chemical analysis of his hands to determine if he had fired a weapon within the past 24 hours. He refused same because he felt that the police would pin the murder on him. He said that he didn't like guns, rifles or hunting.

He told them further that he had been rafting with his girlfriend and some friends in North Carolina on Saturday and that they had returned to Jonesboro at about 9:00 to 9:30 p.m. that night. He intended to sleep a few hours and then drive to New York, but he said that he could not sleep and left for New York at about 10:00 p.m. wearing the same clothes which he had worn while rafting earlier. He stated that he drove directly to New York stopping several times for gas and stopping once to sleep for a brief period of time in North Carolina. He made one telephone call to Trisha but spoke only to her mother since Trisha was sleeping. He carried some additional clothing in his car to change in New York. He went to his home in East Northport at about 7:00 to 7:30 p.m. on Sunday evening to check on his children. He said he parked his vehicle, a Chevrolet Citation, nearby on Cedar Road, facing in the wrong direction, walked through a baseball field which was located behind his home where a baseball game was being played, climbed over a six foot chain-link fence, looked in the back window of his home and saw his children lying in front of the TV, and his wife in "her usual spot" on the couch. He viewed them through a crack in the shutters in the back window. He said that he did not go into the house because Laura, his daughter, was having a personal problem with the separation.

The defendant told the police that the clothing he was wearing at the time of the interview were the same clothes which he wore while rafting – a white V-neck T-shirt, khaki shorts, a wrist watch, light brown socks and "highly polished" wing tipped shoes.

The defendant further stated that after climbing back over the fence and entering his vehicle he drove to East Deer Park Road in an attempt to sleep in his car in the area of an abandoned dairy farm, but that the traffic was too noisy. He then drove his car to a rest area adjoining the eastbound lane of the Long Island Expressway and he spent the night there in his vehicle. He said that he was scheduled to stay with Mr. Porciello, a friend of his, on Monday night, but that he didn't want to bother him on Sunday, despite having no money to sleep in a motel that night.

After awakening on Monday morning he said he drove to a coffee truck parked adjacent to East Deer Park Road where he bought coffee, a roll and the Daily News and telephoned his house because he was worried about Fran. He said that he called at 8:00 a.m., and that he knew this be cause he had looked at his watch; but nobody answered the telephone and he assumed that she (Fran) was in the shower.

At this point the detective, who did not believe his story, asked, "Did you kill your wife?", to which the defendant responded with the words to the effect that: "You're crazy! I'm only trying to help you guys." During the interview he was told several times that he was free to leave, but the detectives indicated that they would like to get as much information as they could at

that time. He was then asked to take a polygraph test which he refused, again stating that he felt the police would set him up. At about lunchtime the defendant was left alone in the interview room for about one hour, during which time the interviewing detectives went to a delicatessen for lunch and brought him back either a container of coffee or a can of soda and cigarettes in accordance with his wishes.

The defendant was never handcuffed during this interview and while he was alone in the interview room the door had been left open, and he was free to leave. After lunch the interview continued, and the defendant persisted in his story. Again the defendant was confronted by Detective Amato's belief that the defendant had killed his wife and the detective stated words to the effect: "Bill, I think you killed your wife in front of your two kids" to which the defendant responded: "Yeah, you prove that."

The defendant's car which had been left at the scene was brought to the precinct for him, and when asked if he would consent to a search thereof, he responded: I don't mind, you won't find anything." The defendant agreed to execute a written consent form and a search was made of his 1980 Chevrolet Citation, New York license plate 730 IOL. No contraband was discovered in the defendant's vehicle, nor was anything of evidentiary value recovered from the vehicle. The police, however, had noted "No-Doz" tablets lying in the front seat, three changes of underwear in a cardboard box, a white shirt and suit, tools, papers and paraphenalia used for flying model airplanes as well as a camera. Nothing was taken from the defendant's car by the officers.

During the course of several hours of interviews which lasted until approximately 9:00 p.m. of that day, the defendant appeared to be indifferent, calm and cool, but belligerent and defensive when the various police accusations were made against him. When asked about his shoes and whether he had any shoes, the defendant stated that in addition to the shoes which he was wearing he had a pair of cowboy boots and pair of work boots.

Although Detective Amato took about ten pages of handwritten notes on memo paper, scraps of paper and a match book cover during the course of his June 28, 1982 interview of the defendant, he destroyed these notes after transposing them into thirty-four pages of notes while on a flight to Atlanta that same evening. All of the transposed notes were turned over to defense counsel as *Rosario* material during the course of the hearing. In addition to being interviewed by Detective Amato on June 28, 1982, the defendant was periodically interviewed by Detective Cavanagh and Detective Sergeant Misegades, but the only time that the defendant was given his *Miranda* warnings was at the commencement of the interview by Detective Amato. Detective Sergeant Misegades, however, asked the defendant whether he had been advised of his rights and he had stated: "Yes, Amato told me." When asked about his refusal to take a polygraph test by Detective Sergeant Misegades, the defendant proffered that he had not taken same because the police would trick him as they had Jeffrey MacDonald, the Green Beret who had gone to high school with him in Patchogue. He did agree, however, to accompany Detective Cavanagh and Sergeant Misegades to Yaphank to discuss a polygraph test with Detective Rick,

a polygraph technician, but after such discussion he again refused the polygraph. When asked by Sergeant Misegades: "Bill, did you kill your wife?" he stated: "I don't have a rifle, I didn't shoot a rifle." Misegades then said: "How did you know she was killed with a rifle? You never even asked me how she was killed."

At 8:20 P.M. Sergeant Misegades received a telephone call from Joseph Vitale, Esq., the partner of Herman Kotler, esq., a civil lawyer who was representing the defendant in his matrimonial matter since March 1982, and who was scheduled to meet him at the bankruptcy court in Westbury at 9:30 a.m. on June 28, 1982. Mr. Vitale had ascertained from his secretary, Mrs. Porciello, the wife of the defendant's friend, that William Patterson was being questioned in reference to a homicide. At that time, Sergeant Misegades was told by Mr. Vitale: "We represent the defendant in all matters and under no circumstances should he be questioned without our presence."

On August 11, 1982 Detective Amato traveled to the home office of the *Atlanta Advertiser* in Atlanta, Georgia, an advertising publication, to review past issues of the paper to determine if any rifles had been offered for sale similar to a .35 caliber Marlin rifle. he made various telephone calls, and about midnight of that day spoke to a Herman Gerald Morris who told him that he had recently sold a .35 caliber Marlin rifle to a man from out of state with a northern accent. On the next day Detective Amato visited Herman Morris with a local police officer and was told that on June 21, 1982 he had received a telephone call from this man inquiring about the rifle which he had advertised in the *Advertiser*. On June 22, this man purchased the rifle from him for $135 cash. The

man told him that he was from out of state and that he was looking for a "varmint gun." Morris told him that he also had a .22 rifle and a .243 rifle for sale which were better suited for shooting varmints, but that the man, whom Morris identified as the defendant, did not want to discuss the other rifles. The defendant was at Morris' home for about three or four minutes while making the purchase. Before paying Morris, the defendant picked up the rifle, simply looked through the scope, and never looked at the chamber of the barrel of the rifle. Morris's wife, Cathy, was not present when the sale was made to the person identified as the defendant.

That evening Morris received a telephone call from the purchaser asking if he had any shells for the gun, but Morris said that he had none. The purchaser asked him if he would buy a box of shells for him since he had no Georgia identification. He told him that he worked at the airport and that he would stop by the next day. Morris related this conversation to his wife and expressed his suspicion of the purchaser, suspecting that he might be buying the gun to kill someone. He decided, therefore, not to purchase any bullets for him. The next day, June 23, at about 5:00 p.m., the purchaser arrived at the Morris home and was greeted at the door by Cathy Morris. He stepped through the doorway and, after inquiring about the shells, Herman Morris told him that he did not have time to purchase shells for him. The purchaser then gave him $20 for shells which Morris agreed to purchase the next day. The man was dressed in the same clothes on that day as he had dressed on the date of the purchase of the rifle. He was described as wearing a dark blue uniform, a white V-neck T-shirt, tennis shoes, wire-rimmed

glasses and he was described as approximately six foot tall, medium build, muscular and balding.

On June 24, the purchaser returned to the Morris residence, and in the presence of Cathy Morris he was given a box of ammunition which had been purchased by Herman Morris at K-Mart. In addition he was given three or four loose rounds of ammunition which Morris had found in his home. Although the ammunition did not cost $20, the man told Morris to "keep the change." After he left, both Herman Morris and Cathy Morris looked out of their patio window and saw the man walk rapidly to his vehicle which was described as a Chevrolet Citation with a white top and maroon bottom, with a shirt hanging in the window. The car was parked several parking spaces to the left of their apartment although there were many unoccupied parking spaces located directly in front of their apartment. The Morrises attempted to view the license tag number of the vehicle, but were unable to do so since he backed out of the parking spot and "was going real fast."

On the date of his first visit to the Morris home, Detective Amato showed photographs of six different men to Herman Morris which he laid out on the coffee table. One of the photographs was that of the defendant, which was an enlargement of a Polaroid photograph taken of him on the date of his interview on June 28, 1982. Morris was told: "Look at these six photos and see if you recognize anyone." Morris selected the photograph of the defendant and state: "This picture looks like the guy that bought my rifle. I can't be one hundred percent; he was wearing a hat and I didn't look at him that good." He was then asked to initial all six photographs. No notes

were kept concerning the photospread identification of the defendant. The photograph of the defendant, because it is an enlargement of a small Polaroid color photo, is somewhat blurred compared to the other photos. Nevertheless, the men appearing therein are substantially similar in facial characteristics to the defendant.

On August 27, 1982 Detective Amato returned to Atlanta with Detective Cavanagh. At about 3:00 p.m. Herman Morris agreed to accompany them to the Atlanta airport. Morris was given a pair of binoculars, taken to a graded area of the airport where he was seated on a "grassy knoll" about two hundred yards from the buildings and asked to see if he could identify anyone. He was told: "Look around, watch people and see if there is anyone you recognize." Mr. Morris viewed about fifty men, but was unable to see from that distance and he stated that he needed a closer view. He was then driven to the middle of the parking lot and was seated in the police vehicle observing a building with a loading platform when he recognized one man out of about forty or fifty men observed in the vicinity. This person got into his car which the police vehicle followed so Morris could get a better look, while Morris "ducked down" in the back seat. At a "parts" store Morris exited the vehicle, hid behind a tree across the street and viewed the man through binoculars as he exited the store. He was just about positive that this was the man to whom he sold his .35 caliber Marlin, but he could not be one hundred percent sure, but he said that he would "stake his life on it." He then asked the police if he could get a closer look. He was now taken to a loading platform at the airport in the vicinity of where he had first seen the man that he

recognized. He was seated on the loading platform with a Coke in hand in order to look like one of the employees. Morris was seated about thirty or forty feet away from the door of the building when the same person exited the building wearing the same clothing and got into his car and left. Morris stated that it looked like the same man but that he still wasn't one hundred percent sure, because he had been wearing a hat the first time he saw him.

On June 8, 1983, Detectives Amato and Cavanagh returned again to Georgia with John Connolly, an M.S.W., psychotherapist and hypnotist who had previously worked with the Suffolk County Police Department on other cases in an effort to elicit information from victims or witnesses who might have been "blocking due to trauma." Herman Morris agreed to accompany the detectives to a Holiday Inn near the airport for the purpose of undergoing hypnosis because his memory was apparently not as good as the police had hoped it would be, and because they were trying to obtain a better description of the person to whom he had sold the gun. During the course of the hypnosis session Detective Amato was present in the room with the hypnotist and Mr. Morris, and a tape recording was made of the session which lasted approximately four hours. Most of that tape was inaudible because the recorder had been placed in the vicinity of an air conditioner, and the drone of the air conditioner made it virtually impossible to hear the entire conversation between the hypnotist and the proposed subject at the hearing. However, the hypnosis was unsuccessful since Mr. Morris was unable to relax as a result of a pinched nerve in the back of his neck. Accordingly, he was never hypnotized. Although the hypnotist did

attempt to elicit information from him, no new information was obtained from him at that time.

At about 8 p.m. the session was terminated and Morris was driven to his home. During the trip he told the police officers in the presence of the hypnotist who was also in the car, that he believed his wife might be able to provide a better description of the man to whom he sold his rifle. At the Morris home Cathy Morris was interviewed by the detectives. Prior to being shown a photospread, and the inducement of hypnosis, Detective Cavanagh took notes of his conversation with Cathy Morris relating to her recollection of the events of June 23 and June 24, 1982. She related a story virtually identical to the events which had been described by her husband. She was then shown the same photospread which had been shown to her husband. She also selected the defendant as the person to whom her husband had sold the .35 caliber Marlin rifle. The photospread was displayed in the kitchen of their apartment. She was told by Detective Cavanagh: "I have some photos to see if you can recognize the guy who bought the gun from your husband." Pointing to the photograph of the defendant she said: "This looks like the man." She was also shown seven photographs of vehicles and asked if she would look through them to see if she could pick out the man's car, and she selected the defendant's Citation. At the hearing both she and her husband positively identified the defendant as the person to whom her husband had sold his .35 caliber Marlin rifle.

Cathy Morris was then hypnotized by Mr. Connolly in the presence of Detective Cavanagh. This session which lasted approximately fifteen minutes, was not

recorded, nor were any notes taken of the conversation between the hypnotist and his subject. During the course of the hypnosis Cathy Morris was unable to provide the license plate number of the Citation which had been the purpose of hypnotizing her. However, she did recall that the person she had spoken to on the telephone in reference to the purchase of ammunition, and who had described himself as the purchaser of her husband's rifle, had given his name as "Bill." This was new information that she had not previously supplied to the police.

On October 27, 1983 the officers returned to Georgia with an arrest warrant for the defendant, and together with members of the Clayton County Sheriffs Office went to the home of the defendant. At the time of his arrest the defendant stated: "I knew it would come to this. I have been waiting for you guys," and volunteered further: "I know what I did and I know what I have to do."

On October 31, 1983 while flying back to New York from Georgia with Detectives Amato and Waukenthein, the defendant stated, not in response to any questions by either of the officers, "I know you're not supposed to discuss this case with me, but what kind of a chance do you think I have?; to which Detective Amato responded: "What chance would anyone have who killed his wife in front of his two kids?" The defendant responded: "Do you think I would have killed her if I knew they were there?" He also asked Detective Amato: "Do you think Vitale is a good lawyer?"; to which Amato responded: "Yes." The defendant then commented: "I can't afford him. I'll probably be stuck with a court appointed lawyer."

CONCLUSIONS OF LAW

DESTRUCTION OF ORIGINAL NOTES TAKEN BY DETECTIVE AMATO DURING INTERVIEW OF DEFENDANT ON JUNE 28, 1982

The application of the defendant to dismiss the indictment or, in the alternative, to strike at this hearing or suppress at trial the entire testimony of Detective Amato upon the ground that he intentionally and wrongfully destroyed ten pages of notes written by him during his interview of the defendant on June 28, 1982, is denied. The testimony given by Detective Amato concerning the destruction of his original notes was credible and uncontroverted by the defendant.

The court finds that the original handwritten notes totaling ten pages written by Detective Amato as and after the defendant answered questions of the police consisted of abbreviations, shorthand notations and scratch notes barely discernible by the detective himself. These original notes were written by him hastily without regard to legibility, comprehensive thought or chronological order. Later that day, while flying to Atlanta to continue the investigation, Detective Amato reviewed his original notes and transposed them into a thirty-four page memorandum, while the events of the day were still clear in his mind. The detective's explanation as to why he did so is fully worthy of belief and reasonable under the circumstances; i.e., the original scratch notes would have been uncomprehensible to him or anyone else in the future unless transposed into more a legible, understandable form, and complete as to original content. Accordingly, the court concludes that Detective Amato acted in good

faith in failing to retain his original notes and was not, as the defendant urges, motivated by a pernicious scheme to thwart the ability of the defendant to effectively cross examine him at trial by using his notes for such purpose. The court has no reason to believe the second draft was anything more or less than a duplicative equivalent of the detective's original notes. *People v. Consolazio*, 40 NY 2d 44; *People v. Malinsky*, 15 NY 2d 86; *People v. Rosario*, 9 NY 2d 286.

A complete copy of the second draft consisting of thirty-four pages of notes written by Detective Amato was furnished to defense counsel at the hearing. They contained statements attributed to the defendant by Detective Amato which are both inculpatory and exculpatory in nature depending upon one's subjective interpretation. The defendant has not demonstrated to the court that the second draft of Amato's notes failed to include *additional* exculpatory comments of the defendant which *might* have appeared in the original notes, or that Detective Amato fabricated or embellished events and statements made by the defendant during his interview by the Police on June 28, 1982.

The cases cited by the defendant which imposed the drastic remedies sought by the defendant are clearly distinguishable from the facts herein. In *People v. Saddy*, 84 AD 2d 175, law enforcement officials, for budgetary reasons, erased a series of tape recordings of conversations between a police officer and the defendant which might have substantiated defendant's claim that he acted merely as the undercover officer's agent in procuring drugs for the latter's use. "Disposition of the case must turn on 'the degree of negligence or bad faith [on the part

of law enforcement officials], the importance of the evidence lost, and the evidence of guilt adduced at trial' (citations omitted)." *People v. Saddy, supra* at 179. There, unlike the case at bar, the tapes were destroyed because they were not inculpatory of the defendant. In the instant case, the second draft of the detective's notes was both duplicative and available to counsel, in addition to being more exculpatory than inculpatory.

People v. Churba, 76 Misc 2d 1028 involved the negligent loss of physical evidence; tape recordings between the defendant and consumer affairs officials, and a television set which he allegedly failed to repair as agreed by him (see also *People v. Davis*, 105 Misc 2d 409); while in *People v. Lunney*, 84 Misc 2d 1090, minutes of the grand jury proceeding were negligently lost thereby depriving the defendant of a valuable impeachment tool, namely, the prior statements of trial witnesses.

Closer to the issue before this court, but readily distinguishable, is *People v. Fleishman*, 92 Misc 2d 156 where, despite representations by the prosecutor that no notes existed, written notes made by a detective during an interview of the defendant who was later charged with perjury were negligently lost. However, there the utterances of the defendant during the interview became the very basis for the crime charged and the written notes were ". . . . not merely evidence which would affect credibility of the recordings of a past event. . . . " *People v. Fleishman, supra* at 159. Nevertheless, that court recognized that the circumstances of that case were somewhat unique in view of the nature of the lost notes.

Several federal court decisions have dealt with the issue of the destruction of written materials whose contents were later incorporated into another writing by the author during his investigation. In each such case the sanctions requested by the defendant were denied. See *United States v. Lane*, 479 F 2d 1131 (destroyed interview notes used to compile report which report was disclosed to defendant); *United States v. Jiminez*, 484 F 2d 91 (destroyed handwritten manuscript from which a report made by an agent who appeared as a witness had been typed); *United States v. Vila*, 599 F 2d 21 (destruction of rough notes of investigator taken during debriefing session after final statement prepared); *United States v. Bernard*, 623 F 2d 551 (lost or destroyed rough notes by agent after final report prepared); but compare *United States v. Carrasco*, 537 F 2d 372 for a contrary result.

Thus, the court concludes, based upon the uncontradicted and unimpeached testimony of Detective Amato, that the second draft consisting of thirty-four pages of notes were a duplicative equivalent in thought and content of the original scratch notes taken by Detective Amato which he destroyed after transposing them. cf. *People v. Consolazi supra* at 454. In hindsight, the better practice would have been to retain the original scratch notes as a supplement to his "final" notes, so that this question would not have arisen. Nevertheless, the court finds that Detective Amato clearly acted in good faith, and not in an effort to thwart the defense by illegal suppression of his original notes. *United States v. Bryant*, 439 F 2d 642.

MIRANDA WARNINGS

The defendant argues that the police never advised him of his constitutional rights (*Miranda* warnings) when he was interviewed by them on June 28, 1982. *Miranda v. Arizona*, 384 U.S. 436. In support of this contention, defendant suggests that the testimony of Detective Amato that he gave the defendant his *Miranda* warning before beginning his interview with the defendant is unworthy of belief because: (1) the police did not procure a written waiver of such rights signed by the defendant although such a form was available and not used by them; (2) the interview session with the defendant could have been taped or video recorded; (3) the explanation that they did not tape or video record the session with the defendant because he was a bereaved widower is incredulous; and (4) the defendant cooperated by executing a written consent form to search his car.

Collectively these circumstances do not persuade the court to conclude that the defendant was not given the warnings mandated by Miranda, especially where three police officers whom the court had an opportunity to observe during the hearing testified to the contrary.

Accordingly, defendant's request that the oral statements attributed to him by the police during their interview session conducted June 28, 1982 be suppressed as evidence at trial for the failure to recite the *Miranda* warnings to him prior to questioning, is denied. Although the court finds that the warnings were given, for the reasons set forth hereinafter, the court concludes, as a matter of law, that the defendant was not in custody

during the questioning and therefore, he need not have been given such warnings.

RIGHT TO COUNSEL

Defendant also contends that the oral statements alleged to have been made by him to the police during the interview session of June 28, 1982 should be suppressed as evidence in chief at trial because he was denied the right to have counsel present when being questioned. He argues that (1) the police were initially advised at 3:20 a.m. on June 29, 1982 that the defendant would be arriving later that day to attend a bankruptcy proceeding; (2) the defendant was in fact represented by counsel since March 1982 in the bankruptcy proceeding and a matrimonial action which were still pending: (3) but for being questioned by police, he would have been with his attorney who represented him in the civil bankruptcy proceeding; and (4) since the subject being discussed by the defendant with the police during the interview related to the pending civil matters, knowledge that the defendant was represented by counsel should be imputed to the police, particularly since he was deemed a suspect in the shooting death of his wife.

The court concludes, as a matter of law, that the defendant was not in police custody during their questioning of him on June 28, 1982. The interests of the police to quickly gather as much information as possible to aid in their investigation of the shooting death of Frances Patterson was explained to the defendant who had agreed to cooperate with them. There was no subjective reason for the defendant to believe that he was then in

custody, or not free to break off the interview at any time. Although the defendant underwent many hours of questioning by the police, he was never formally arrested or handcuffed. The test to determine whether a defendant was in custody prior to receiving the mandatory *Miranda* warnings is "what a reasonable man, innocent of any crime, would have thought had he been in the defendant's position." *People v. Yukl*, 25 NY2d 585 cert. den. 450 U.S. 851. Under these circumstances, thee was no reason why a reasonable person would have thought he was then in custody.

Although the defendant was not in custody on June 28, 1982 when questioned by the police, nevertheless, as a "technical" suspect, he was given the four-fold warnings required by *Miranda* which were adequate to apprise the defendant of his constitutional rights which he thereafter voluntarily and intelligently waived.

A defendant's right to counsel during the investigative stage of a criminal proceeding attaches when the accused requests the aid of an attorney (*People v. Cunningham*, 49 NY2d 203) or when an attorney enters the proceeding. *People v. Hobson*, 39 NY2d 479. Statements thereafter made by a defendant to the police in the absence of an attorney are suppressible. *CPL, Section 710.10(3)*. This "indelible" right to counsel extends to individuals who are represented by counsel in pending unrelated criminal matters (*People v. Rogers*, 48 NY2d 167; *People v. Bartolomeo*, 53 NY2d 225; *People v. Smith*, 54 NY2d 954) as well as to individuals who are questioned in a noncustodial environment. *People v. Skinner*, 52 NY2d 24; *People v. Knapp*, 57 NY2d 161, 175-176.

At no time on June 28, 1982 did the defendant advise the police who were questioning him that he had retained counsel to represent him on the matter which the police were then investigating. *People v. Skinner, supra.* Nor did the defendant unequivocally inform them of his intention to retain or even consult with an attorney regarding the matter the police were then investigating. *People v. Rowell,* 59 NY2d 727; *People v. Johnson,* 55 NY2d 931. The defendant did not have any previous unrelated criminal charge pending on June 28, 1982 when he spoke to the police. *People v. Rogers, supra.* Although the police were aware that the defendant was to attend a bankruptcy proceeding at the very time they were interviewing him at police headquarters, the police had no actual knowledge that he was represented by counsel in a *pending unrelated criminal matter,* or actual knowledge of any pending charges against the defendant thereby placing them under an affirmative obligation to inquire as to whether or not he was represented by counsel. *People v. Fuschino,* 59 NY2d 91; *People v. Smith, supra; People v. Servidio,* 54 NY2d 951.

The defendant's representation by his attorney prior to police questioning concerned civil matters which were unrelated to the subject of the police inquiry and, accordingly, the police were unaware of any such representation. Nor can knowledge that the defendant was represented by counsel be imputed to the police via the oblique references that the defendant was obliged to attend a bankruptcy proceeding that morning, clearly a proceeding civil in nature. cf. *People v. Walker,* 61 NY2d 138, 146 (footnote 5); *People v. Vidmosko,* N.Y.L.J., May 14, 1984, p. 15, col. 1 (App. Div., Second Dept.)

Therefore, the court concludes that there was no obligation on the part of law enforcement officials to determine whether or not the defendant had retained counsel to represent him in his pending bankruptcy matter, although they were certainly aware that he was scheduled to appear in the bankruptcy court that morning. There is no existing precedent to hold that the right to counsel indelibly attaches where a suspect has a pending civil matter unrelated to the criminal matter under investigation by the police. Nor does the court attach any significance to the defendant's contention that he would have been with his civil attorney had the police not been questioning him regarding the death of his wife the night before. This court is not prepared to extend existing law to such a fortuitous circumstance so as go give free rise to a defendant's absolute right to the presence of such counsel during any questioning by the police. Moreover, it is significant to note that the defendant made no mention of an attorney representing him in the pending civil proceeding, or even a desire to contact him during his interview by the police, although he had amble opportunity to do so.

HYPNOSIS OF HERMAN AND CATHY MORRIS

The court is clearly convinced that the two hypnotic sessions involving Herman Morris and his wife, Cathy Morris, woefully failed to meet the strict standards set forth in *People v. Hughes*, 59 NY2d 523, 543-544 (footnote 33) for the use at trial of testimony of a witness who had undergone hypnosis. In each of the sessions, individuals other than the subject and the hypnotist were present; only the session involving Mr. Morris was recorded,

although portions thereof were inaudible; and information which the police gave to the hypnotist prior to the start of each session was not recorded. Although the decision in *Hughes* was rendered after the Morrises were subjected to hypnosis, the standards adopted therein are so critical to insure a fair trial to the defendant, that where, as here, the people intend to utilize hypnosis as part of its direct case, the *Hughes* standards should be applied retroactively. This court is not unmindful of another lower court's refusal to grant retroactive effect to these standards. *People v. Barnes*, 123 Misc.2d 142. However, the case involved a motion to vacate a judgment pursuant to *CPL, Section 440.10(1)(h)*, and the defendant was seeking to obtain "full retroactive effect." Nevertheless, even that court recognized that the effect of hypnosis upon a key prosecution witness went to the very heart of the guilt/innocence issue, although it declined, "at the *nisi prius* level . . . to make far-reaching rules which may have an impact upon similarly situated defendant and affect the administration of justice." (*supra* at 147). In the instant case, this court is not being asked to overturn the results of a completed trial, but rather to insure a fair trial from its very inception. This court can do no less.

The Court of Appeals has recognized that there are degrees of retroactivity to be accorded constitutional standards vis-a-vis cases pending in the courts. "thus, where otherwise there could be a complete miscarriage of justice, current constitutional standards that go to the heart of a reliable determination of guilt or innocence have been substituted for those in effect at the time of trial. (*Stovall v. Denno*, 388 US 293, 297 (right to counsel

decisions 'at states of the prosecution where denial of the right must almost invariably deny a fair trial'); *Holloway v. McElroy*, 632 F.2d 605 (appellate review of sufficiency of evidence)). So too, at the other end of the spectrum, decisions which are only collateral to or relatively far removed from the fact-finding process at trial have been applied prospectively (citation omitted) (Exclusionary rule in search and seizure cases, the intended deterrent effect of the ruling having no necessary relationship to the reliability of the admitted proof). *People v. Pepper*, 53 NY2d 213, 221.

Thus, right to counsel cases involving pretrial encounters have been assigned a middle ground with retroactivity being denied where the appeal process has been exhausted. *People v. Pepper, supra* at 221.

The apparent intention of the *Hughes* criteria is to insure, as best as possible, within the limitations endemic to hypnotically induced testimony, the reliability of the proof being offered at trial. It is an effort to somewhat cleanse otherwise inherently unreliable testimony, which, in the instant case, goes to the very question of the guilt or innocence of the defendant, or the circumstances pointing thereto.

Nevertheless, the court concludes that Mr. Morris was not in fact hypnotized, and that nothing which occurred during his exposure to the hypnotist was "so impermissibly suggestive as to require exclusion of in-court testimony with respect to such prehypnotic recollection." *People v. Hughes, supra* at 546. Although the hearing testimony of Mr. Morris was hazy at times, he did have a clear and accurate recollection of the events

prior to the unsuccessful hypnosis session. His recollection of his contacts with the defendant was not contaminated by the attempt to induce hypnosis and was the product of a source independent thereof sufficient to arrive at an untainted identification of the defendant. As the court recognized in *Hughes*: " . . . where the witness was quite confident in his initial recollections and hypnosis was employed unsuccessfully to yield additional details, there may be little or no impairment of the defendant's power to cross-examine." *People v. Hughes*, ibid.

Therefore, the people will be permitted to utilize the testimony of Herman Morris as to his recollections of the events which transpired on the three occasions it is alleged he met with the defendant resulting in the sale of the .35 caliber Marlin rifle and the .35 caliber ammunition.

The court reaches a similar conclusion with respect to the testimony of Cathy Morris who, in fact, was successfully hypnotized. Based upon the testimony of the hypnotists and Mrs. Morris, there was nothing suggestive in her contact with the hypnotist which contaminated her pre-hypnotic recollections. Likewise, her pre-hypnotic recollections concerning two of the three visits allegedly made by the defendant to her Georgia home during which she was present resulted from a source strongly independent of her exposure to hypnosis. However, her hypnotically induced recollection of the name "Bill" as the identity of the purchaser shall be suppressed as the product of an improperly conducted hypnotic session, since she had never provided such information to the police prior to hypnosis and the *Hughes* criteria were not

utilized. The people have recognized such and have previously agreed not to offer same in evidence at the trial.

PHOTOGRAPHIC IDENTIFICATION OF THE DEFENDANT

Defendant argues that the in-court identification of the defendant by Mr. and Mrs. Morris should be excluded at trial since it is the product of a tainted pretrial identification. Mr. & Mrs. Morris were separately shown on different occasions six black and white photographs of white males. Defendant contends that this photo array was unduly suggestive principally because the photo used of the defendant was blurred and distorted when compared to the other photographs. He contends, therefore, that this unduly singled out the photo of the defendant as the person each should select as the individual who purchased the .35 caliber Marlin rifle. The blurred photograph of the defendant was not the result of any intentional act by law enforcement officials, but the product of an enlargement of a color Polaroid photograph of the defendant reproduced in a black and white format. Close scrutiny of the photographs shown to the Morrises do not reveal anything distinctive about the defendant's physical appearance therein. In fact, the photographs of the individuals composing the array were remarkably similar in appearance to the defendant, who is bald and wears eyeglasses. Despite the lack of clarity of the defendant's photograph, the photographs utilized by the police "were substantially and sufficiently similar to each so that they were not impermissibly suggestive." *People v. Fox*, 65 AD2d 880. See also Sobel, *Eyewitness Identification*

(1983) Section 5.3(a) text at page 5-11 and footnote 54 thereat.

Furthermore, the court also concludes that the in-court identification of the defendant by Mr. and Mrs. Morris was predicted upon a source of observation which was entirely independent of, and untainted by, the photographic array shown to them. *People v. Adams*, 53 NY2d 241, 248. Mr. Morris observed the defendant on three separate occasions during visits by the defendant to his home in June 1982 when he allegedly sold a rifle to the defendant. On each occasion, Mr. Morris spoke to the defendant in a face to face confrontation. The duration of the three visits was sufficient to afford Mr. Morris an opportunity to clearly view the defendant in the absence of any physical obstacles thereto. Moreover, during the last visit when the defendant picked up the cartridges which Mr. Morris had purchased for him, he testified that his suspicions were aroused triggering him and his wife to focus on the defendant with a high degree of attention as the defendant returned to his car after purchasing the ammunition.

For the same reasons, the court likewise concludes that any in-court identification trial testimony by Cathy Morris shall be permitted since the same is based upon a source independent of the photographs shown to her by the police, although she met the defendant one time less than her husband. The same was not the result of her viewing any unduly suggestive photo array.

CORPOREAL IDENTIFICATION OF THE DEFENDANT AT THE HARTSDALE AIRPORT BY HERMAN MORRIS

Any testimony relating to the corporeal viewing of the defendant by Herman Morris at the Hartsdale Airport on August 27, 1982 shall be suppressed since the same was conducted without notification to defense counsel where the police had prior notice of the defendant's representation of counsel.

In *People v. Blake*, 35 NY2d 331, 340-341, the Court of Appeals, discussing presence of counsel at identification viewings has stated:

> "Where the accused has counsel known to the law enforcement authorities or there is insufficiently explained delay which prevents him from obtaining counsel as he would on arraignment, and he has not waived the right to counsel, the circumstances may establish his right to counsel at the viewing, the breach of which should result in exclusion."

Exigent circumstances may exist to overcome his right to counsel at such viewing "such as, where the identifying witness was believed to be *in extremis*, or even just in the hospital (citations omitted)." *People v. Blake, supra* at 337. There certainly were no exigent circumstances existing on August 27, 1982 which necessitated a corporeal viewing of the defendant by Mr. Morris without the presence of defendant's counsel, or at the very least, upon notice to counsel.

Such a viewing by a witness is inherently suspect, thus, the need for protection of counsel once the right to counsel has attached. Although not measuring up to a "face to face" confrontation as a classic showup, the

circumstances surrounding the viewing of the defendant by Mr. Morris certainly fell within the parameters cited in *Blake*. The court emphasizes, however, that the tactics used in this instance by the police were not unduly suggestive of the defendant's identify which would thereby taint any in-court identification of the defendant by Mr. Morris. Moreover, the court has previously concluded that a source, (i.e.) his three observations of the defendant at his home, independent of the corporeal identification at the airport, exists which enables Morris to identify the defendant in court at trial. The methods used by the police on this occasion were not unduly suggestive since they did not point the viewer to the defendant resulting in a facial encounter between them. The people, however, should have advised defendant's counsel of the intentions to conduct such a corporeal identification procedure.

OTHER SPONTANEOUS STATEMENTS ATTRIBUTED TO THE DEFENDANT BY THE POLICE

Upon arriving at 8 Atlas Way, East Northport, New York and encountering P.O. Rubin in the street outside his home on June 29, 1982, defendant, after being told that an incident had occurred, made many statements not in response to police questioning. The court concludes that these were spontaneous utterances made by the defendant which in no way were the products of law enforcement interrogation. Defendant's statements satisfy the definition formulated in *People v. Maerling*, 46 NY2d 289, 302-303: "Spontaneity has to be genuine and not the result of inducement, provocation, encouragement or acquiescence, no matter how subtly employed."

Such statements shall be admissible at trial. They were "blurted out by the defendant (and) in effect (were) forced upon the officer." *People v. Grimaldi*, 52 NY2d 611, 617. Furthermore, the defendant was not in police custody at the time of these utterances.

For similar reasons, any statements attributed to the defendant upon his arrest at his home in Georgia on October 27, 1983 and while traveling by airplane to New York in police custody thereafter will be admissible at trial as spontaneous utterances of the defendant.

ENTER,

/s/ _____
STUART NAMM, J.C.C.